## INDEX.

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### Petition.


Summary statement ..... 2
Statement of case showing development of federal questions raised ..... 4
The constitutional questions involved ..... 17
Reasons relied upon for the allowance of the writ ... 21


### Brief.


Official and printed reports of case in state courts ... 27
Constitutional questions involved ..... 28
Ground for jurisdiction ..... 28
Statement of the case ..... 29
Full faith and credit ..... 30
Due process of law ..... 39
Nature of the case ..... 39
Jurisdiction of Ohio Court of Appeals ..... 46
Duty of the Court of Appeals to make findings of fact ..... 50
The Cleveland divorce ..... 54
Right of due process ..... 57
Conclusion ..... 67


### Cases and Authorities Cited.


Aetna Life Ins. Co. v. Duncan, 266 U. S., 389, 393, 394 ..... 21, 31

Bank of Columbia v. Okley, 4 Wheaton, 235..... 57
Barnes v. Ry. Co., 122 U. S., 114..... 60
Barnum v. Barnum, 42 Md., 298..... 33
Beck v. Beck, 45 Ohio Appellate, 507..... 56
Blackburn v. Crawford, 3 Wallace (U. S.), 175..... 33
Bradford Electric v. Clapper, 286 U. S., 145, 154-161 31
Chicago, etc., v. Chicago, 116 U. S., 226, 234, 237.... 59
Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S., 472, 478 ..... 35
Clark v. Roller, 199 U. S., 541..... 46
Connolly v. Union Sewer Pipe Co., 184 U. S., 540, 558, 559 ..... 57
Dairn v. Vacuum Oil Co., 113 S. (La.), 751..... 33
Davis v. Weshler, 263 U. S., 23, 24..... 21
Del Castillo v. McConnico, 168 U. S., 674..... 58
Den. Murray v. Hoboken Land Co., 18 How., 272, 280. 58
Elliott v. Pierson, 1 Peters, 328.....59, 63
Frankenberg v. Frankenberg, 70 Ohio Appellate, 495. 55
Galpin v. Page, 18 Wall. U. S., 350, 370, 373.....62, 64
General Code of Ohio:
Section 11903..... 40
Section 11306..... 40
Section 11379..... 41
Section 12223-30.....51, 53
Section 11421-2 ..... 51
Gilmore v. Fitzgerald, 260 S., 175..... 33
Greenleaf on Evidence, 16th Ed., Vol. 1, page 627... 32
Hardway, et al., v. Consumers' Brewing Co., et al., 15 C. C. (N. S.), 349; affirmed 87 O. S., 485..... 44
Harris v. Hardiman, 14 How. U. S., 334, 341..... 58

Harris v. Hordeman, 14 Howard (U. S.), 334, 341... 21
Hurtado v. Cal., 110 U. S., 516, 527..... 57
In Re Dirinza, 118 N. E., 942..... 33
In Re Redman, 135 O. S., 584..... 36
Ireland v. Chenney, 129 O. S., 527..... 48
John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S., 178, 181-183 .....21, 31, 37
Kingsborough v. Tousley, 56 O. S., 450, 455, 460.... 66
Laws of Arizona:
Section 3836 ..... 10
Section 3844 ..... 10
Leefer v. Texas, 139 U. S., 462, 468..... 57
Lessee of Hickey v. Stewart, 3 How. (U. S.), 750, 762. 63
Levick v. Vonnell, 137 O. S., 453; 30 N. E. (2), 808, 810-11 ..... 53
Matthews v. Huwe, 269 U. S., 262..... 29
Mossman v. Mossman, 4 Ind., 648..... 33
Murdock v. Memphis, 20 Wall. (U. S.), 590, 635, 636. 21
Niles v. Sprague, 13 Iowa, 202..... 32
Ohio Constitution:
Article 4, Section 6..... 18, 42
Article 4, Section 2.....14, 18, 42
Old Wayne Mut. L. Assurance Co. v. McDonough, 204 U. S., 8, 15, 17..... 62
Pennoyer v. Neff, 95 O. S., 714..... 66
Pennywit v. Foote, 27 O. S., 600, 615, 618..... 66
Produce Co. v. Dennert, 104 O. S., 149.....52, 53
Raymond v. Railway Company, et al., 57 O. S., 271, 272 ..... 43, 44
Rea. v. Fornan, 46 N. E. (2d), 649..... 27

Rea v. Fornan, 46 N. E. (2d), 664 ..... 27
Rea v. Fornan, 46 N. E. (2d), 667 ..... 27
Rea v. Fornan, 140 O. S., 546 ..... 27
Rea v. Fornan, 141 O. S., 476 ..... 27
Reynolds v. Stockton, 140 U. S., 254, 265, 268 ..... 60
Rhode Island v. Mass., 12 Peters, 657, 715 ..... 59
Richmond v. Patterson, 3 Oh., 368 ..... 32
Rose v. Himely, 4 Cranch., 241, 266, 267 .....59, 63

Scott v. McNeal, 154 U. S., 34, 40 .....21, 58, 59
Spier v. Corll, 33 O. S., 236, 244 ..... 66
State ex rel. Farber, Rec., v. Jones, 95 O. S., 357, 363 ..... 47
State ex rel. Lander v. Prestlien et al., 93 O. S., 423. 48
Stanglerin v. State, 170 S., 453 ..... 32

Thomas v. Whiteman, 18 Wall., 457 ..... 66
Titus v. Wallick, 305 U. S., 585, 306 U. S., 282...29, 38
Town of Weyanwega v. Ayling, 99 U. S., 112, 119.... 35
Truax v. Corrigan, 257 U. S., 254 ..... 65
Tumey v. Ohio, 273 U. S., 510, 515 ..... 29

U. S. Constitution:
Article 4, Section 1 .....14, 15, 21, 28, 30, 51
U. S. v. Cargo, 11 Fed. (2d), 805, cert. denied, 273 U. S., 696 ..... 31
U. S. v. Cruikshank, 92 U S., 542, 554 ..... 59
U. S. v. Walker, 109 U. S., 258, 267 ..... 21

Van Huffel v. Harkelrode, 284 U. S., 225-230.....21, 29

Wall v. Federation Co., 121 O. S., 334, 337 ..... 45
Williamson v. Berry, 8 How. (U. S.), 495, 540, 541.. 59
Walker v. Sauvinet, 92 U. S., 92, 93 ..... 58
Waters v. Corlett, 123 O. S., 632 ..... 49

Williams v. North Carolina, .. U. S., .., 87 L. Ed., 189, 192 .....33, 38
Williams v. Cowling, 63 Sup. Rep., 207..... 21
Windsor v. McVeigh, 93 U. S., 274, 282, 283..... 60
Windsor v. McVey, 93 U. S., 274-277..... 21
Yick Wo v. Hopkins, 118 U. S., 356, 369, 370..21, 57, 65

# Supreme Court of the United States

## OCTOBER TERM, 1942.

**No. .....**

RALPH REA, Mary Boland, Katherine Gruber, Anna Ford, Julia Caley, James Welsh, William Welsh, Matthew Welsh, Nora M. Page, Timothy Murnan, Mary Meyer, Grace Visser, Howard W. Meyer, John J. Meyer, Maria Miller, Nellie Pagnard, Virginia Rea and Ruth Hirt,

*Petitioners,*

vs.

MARGARET FORAN, now known as Margaret M. Catcher, Mary Martin, Mary Fallon, Joseph Fallon, John Murnan, known as David Murnan, Julia Hurst, Margaret Murnan, Julia Meager, Herman Murnan, Paul Murnan, Jerry Murnan, John Murnan, Mary Murnan, James Murnan, Thomas Murnan, Dorothy Firoben, Ragina McDonough and Katherine McDonough.

*Respondents Associated in Interest with Petitioners,*

WILLIAM B. DEVANNEY, Lulu Devanney, Daisy Devanney Pike, William B. Devanney, as Executor under the Last Will and Testament of James Devanney, Anna McDonough Aplin, Lawrence McDonough, James McDonough, Fred McDonough, Edward McDonough and Raymond W. Kilbourne, Executor of the Estate of Grace Backenstoe Murnan, Deceased, Margaret Fallon Lunn and Grace D. Backenstoe, Deceased,

*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioners, Ralph Rea, Mary Boland, Katherine Gruber, Anna Ford, Julia Caley, James Welsh, William Welsh, Matthew Welsh, Nora M. Page, Timothy Murnan, Mary Meyer, Grace Visser, Howard W. Meyer, John J. Meyer, Maria Miller, Nellie Pagnard, Virginia Rea and

Ruth Hirt, respectfully pray for a writ of certiorari to be addressed to the Supreme Court of Ohio, the court in which the record is now lodged under provisions of Section 237 (b) of the Judicial Code, as amended, under the Act of February 13, 1925, U. S. C., title 28, section 344 (b) (8 F. C. A., title 28, para. 344 (b)), and Rules of Practice and Procedure.

The final order and judgment in the Supreme Court of Ohio in this cause was rendered and entered on the 17th day of March, 1943. This petition is filed in this court on the .. day of ....., 1943. The certified transcript of the record in the case and the proceedings in the Supreme Court of Ohio are herewith transmitted with this petition.

## SUMMARY STATEMENT.

A brief statement of the undisputed facts of the case are as follows:

For many years prior to 1919, Mrs. Grace Backenstoe, the legal ancestor of the respondents herein, operated a large house of prostitution in Columbus, Ohio. In 1912 she went to Cleveland, Ohio, for the purpose of opening a house of prostitution. While there, she obtained an alleged divorce from George Backenstoe, her husband, in the Insolvency Court, a limited statutory court, upon an affidavit for service by publication sworn to before her attorney of record, as found by the Court of Appeals, Franklin county, Ohio. This act, under the applicable statutes and the law as declared by the Ohio courts, rendered the affidavit void. She then returned to her house of prostitution in Columbus. While still conducting that house of ill fame she maintained a meretricious relation-

ship with M. P. Murnan, and she and Mr. Murnan, the legal ancestor of your petitioners, took an automobile trip to the San Francisco fair.

At the first trial of this cause, while alive, Mrs. Backenstoe, under oath in a deposition claimed that while returning from this trip she had married Mr Murnan by statutory license and ceremony, before one witness, at Flagstaff, Arizona, in July, 1915; that that was her only marriage to Mr. Murnan; that she never had any papers established by the statutes of Arizona, evidencing said marriage. **There was no record whatever, as required by the statutes of Arizona, of said claimed marriage or the issuance of a license.** No papers, authenticated or otherwise, were produced in evidence of said marriage. The Arizona statutes specifically prohibited common law marriages. Further, for some time prior to July, 1915, and as found by the Court of Appeals and Court of Common Pleas of Franklin county, Ohio, she had maintained a meretricious relationship with Mr. Murnan.

Upon their return to Columbus, the two immediately separated; Mrs. Backenstoe returned to her house of prostitution conducting her own business until after 1919 staying at her own home even after houses of prostitution had been closed by governmental authorities. Mr. Murnan returned to his home with his mother on Eighteenth avenue in Columbus. **Until after 1919 both she and Mr. Murnan represented themselves to be single and unmarried in the execution of deeds, bank accounts and other legal papers, and each of them held himself or herself out to the public as such.** Thereafter they moved into a highly respected neighborhood and proceeded then, to hold themselves out and introduced themselves

as man and wife until the death of Mr. Murnan. She then claimed legal title and took possession of Mr. Murnan's $175,000 real estate as a surviving spouse. There were no children, or direct descendants.

## STATEMENT OF CASE SHOWING DEVELOPMENT OF FEDERAL QUESTIONS RAISED.

A petition was filed in the Court of Common Pleas, Franklin county, Ohio on the twenty-eighth day of February, 1938 (page 5, record). Ralph Rea was the plaintiff, the heirs of M. P. Murnan, deceased, and Grace Backenstoe were named defendants. Though the petition is called "Petition in Partition" it contained two causes of action; one distinctly and exclusively an action at law in ejectment, as conceded by the respondent heirs of Grace Backenstoe and as recognized by the Court of Appeals, the other distinctly equitable as conceded by the respondent heirs of Grace Backenstoe. The petition alleged that Ralph Rea was seized in fee simple to the legal title of an aliquot part of the 17 parcels of real estate described in the petition.

First, as against Grace Backenstoe, petitioner alleged that she was in the possession of said real estate and claimed some interest therein and asked that Grace Backenstoe be compelled to set it up and that it be declared void. He also set up a claim for rents and profits collected by her while in unlawful possession.

Second, as against the other defendants, the heirs of M. P. Murnan, the plaintiff, alleged that they were tenants in common with your petitioner, asked that partition be had of such real estate.

Grace Backenstoe filed an answer (page 19, record) in

which she did not deny any of the allegations of the petition but set up new matter as a defense, alleging that she alone held the fee simple title to said real estate and held it as the surviving spouse of M. P. Murnan and prayed that the petition be dismissed. There were other answers filed before and after her death but they did not alter or change **the only** issue raised by the answer filed by Grace Backenstoe. To that answer of Grace Backenstoe a reply was filed denying the new matter set up as a defense.

The case came on for trial and the only controversy and issue heard and tried at any time was that **in ejectment, at law,** between your petitioners and Grace Backenstoe. There was no issue raised or tried among your petitioners and those associated in interest as to their respective rights in partition in the property, after the possession thereof was recovered, by the action at law, from Grace Backenstoe.

This trial resulted in a non suit. Your petitioners were not permitted to offer any evidence that Grace Backenstoe was not the surviving spouse of M. P. Murnan. Upon appeal, at law, to the Court of Appeals that judgment was reversed and the cause remanded for another trial. Prior to the second trial Grace Backenstoe died. After her death the action was revived in the names of respondents.

The second trial in the Common Pleas Court was had without the intervention of a jury. The only controversy arising and issues tried then, was the action, **at law, in ejectment.**

At the trial an issue was raised by the evidence introduced by the petitioners showing that an alleged divorce

procured by Grace Backenstoe in Cleveland, Ohio, in 1912, was secured without jurisdiction, apparent upon the record in the court and was therefore void.

The second trial court, His Honor, Turner, Judge, decided the cause, being No. 154482, and upon request of the heirs of Grace Backenstoe, the court made a finding of fact and conclusions of law (page 75, transcript).

The court found therein, that by stipulation of counsel, the issue was limited to the question whether or not Grace Backenstoe, otherwise called Grace D. Murnan, was the **sole heir at law** of M. P. Murnan and the **lawful spouse** of M. P. Murnan; that the heirs of M. P. Murnan, as named in the petition are entitled to the legal title and possession of the real property involved; that the laws of Arizona require the issuance of a license, certificate of marriage, two witnesses, and marriage before a person duly authorized and that a record be made of the same and that common law marriages were prohibited; that Grace Backenstoe was not the surviving spouse of Murnan and was not married to him according to the statutes of Arizona, or by common law, that there was no record of such marriage as required by such statute, that the records of Arizona disclose no license was issued to either Murnan or Grace Backenstoe or Grace Daugherty; that she testified that that was her only marriage to Murnan.

The court then entered judgment at law for legal possession and title in the heirs of M. P. Murnan against the heirs and devisees of Grace Backenstoe and rendered judgment against her for $18,000 rents. He then decreed partition among the heirs of M. P. Murnan.

An appeal was then taken to the Court of Appeals of Franklin county, Ohio, by the heirs of Grace Backenstoe, as upon questions of law and fact **in chancery** under Article 4, Section 6, of the Ohio Constitution, as amended in the year 1912, and also an appeal on questions of law (pages 96-97, record).

Your petitioners (page 98, transcript), thereupon filed a motion to dismiss the appeal on law and fact and on law, specifically asserting, that the court had no jurisdiction to try the appeal on questions of law and fact. The court overruled that motion (page 100, transcript). Entry on motion (page 107, transcript). By order of the court, over the objections of your petitioners (record, page 108), the cause was set down and tried as a case in chancery, de novo, **on the sole issue of ejectment at law,** and upon the transcript of the testimony taken in the court below and upon depositions taken under said order. Most of the testimony taken by deposition in the Court of Appeals by the respondents was cumulative on the claim that Mrs. Grace Backenstoe and Mr. Murnan held themselves out as man and wife after 1919 and had that reputation among their friends and neighbors. The court rendered its decision March 12, 1942, in favor of respondents (page 210, transcript).

Upon specific request by your petitioners (page 246, transcript), the court announced a decision, April 17, 1942, purporting to incorporate findings of fact and conclusions of law (page 250, transcript).

On April 29, 1942, your petitioners filed an objection to the proposed finding of fact (page 259, transcript) and made a demand in writing in the same paper for a finding of fact and conclusion of law in conformity to their

former application and motion and in accordance with the statutes and law applicable to the record, and attached thereto a suggested finding of facts and conclusions of law.

On May 23, 1942, before judgment was rendered, your petitioners filed a supplemental request and demand for findings of fact and conclusions of law applicable thereto, and noted their exceptions and objections to the proposed judgment entry submitted by the respondents (page 265, record).

In the supplemental request your petitioners specifically noted their objections and exceptions, that the proposed finding and decision was not sufficient in law to support any judgment which the court might assume to render and as being **in violation of the constitutional rights of your petitioners under the Fourteenth Amendment to the United States Constitution** (page 268, transcript), and that any judgment rendered thereon and therein would be rendered without jurisdiction of the court, on the record, a denial of due process of law; of the equal protection of the laws and of the taking of the property of your petitioners.

Your petitioners further objected an exception that the Court of Appeals was bound by the finding of facts and conclusions of law of the trial court and the judgment it rendered unless manifest error intervened (page 269, transcript).

Your petitioners filed a motion before judgment further objected and asserted that (page 271, transcript), including an exception to the finding of fact and conclusions of law of the Court of Appeals as contained in its decision of April 17, 1942, and moved the court to answer 37 specific interrogatories

addressed to it, material to the issue raised by the petition in order that a reviewing court might determine whether manifest prejudicial error intervened as specifically required by Section 1223-30, Ohio General Code, among which were the following:

> "10. Was a marriage license issued for the marriage of Maurice P. Murnan and Grace Backenstoe, or Grace Daugherty in Conconio county, Flagstaff, Arizona, in 1915."

Then follows several questions as to when and to whom any license was issued and where and who and how said ceremony was performed. Also:

> "18. If a ceremony was performed, did the person performing it endorse the solemnization of the rites of matrimony upon said license and make return of the same to the office of the clerk of the Superior Court of Conconio county, Arizona, at any time?
>
> "19. Was there a marriage certificate evidence of such marriage executed by the person performing the ceremony and signed by two witnesses?
>
> "20. Did Grace Backenstoe receive, after such alleged marriage ceremony, any papers relating to any such marriage?
>
> "21. If a marriage license was issued, what became of it?
>
> "22. If a marriage certificate was executed, what became of it?
>
> "23. Was any part of the marriage record of Conconio county, Arizozna, lost, destroyed or stolen? And which?
>
> "26. Are the marriage records of the clerk of Superior Court of Conconio county, Arizona, complete for the years 1912 to 1920?"

All of these motions and objections were overruled, and the court refused to answer the interrogatories, and denied the constitutional claims asserted.

Thereafter, judgment was entered embracing a finding of fact and conclusions of law (page 276, transcript).

The judgment entry of the Court of Appeals contained **four separate findings of fact, A DIFFERENT ONE BY EACH JUDGE.**

**There is no finding by the court of the issuing of a license or of a statutary marriage in the findings of fact and judgment entry and decree, and no attempt to make any finding of any license or marriage until the specific separate and different findings made by each separate judge.**

The majority of the Court of Appeals found that the laws of Arizona, pertinent to the issue, in force in 1915, were as stated in the judgment entry and decree (R., 279), and that the following sections were included:

"12. That the laws of Arizona in force and effect in 1915 were:

> "Section 3836. The clerk of the Superior Court shall record all licenses issued by him as provided in this chapter in a well bound book kept for that purpose, and it shall also be the duty of the persons solemnizing the rites of matrimony to endorse the same on the license and make return of the same to the office of the clerk of the Superior Court within twenty days after the solemnization as aforesaid, which return shall also be recorded in a well bound book kept by the clerk of the Superior Court for that purpose."
>
> "Section 3844. **The common law that a marriage may be contracted by agreement of the parties without marriage ceremony is hereby abrogated and no marriage contracted within this state shall be valid, unless a license be issued as provided in this chapter,** and a marriage solemnized by one of the persons authorized by law or by one purporting to act in the capacity of a clergyman, judge or justice and be-

lieved in good faith by at least one of the parties, to be such."

The majority Court of the Appeals then found:

> "13. **The marriage records in the Supreme Court for Conconio county, Arizona, fail to show that any marriage license was ever issued to Pat Murnan, or Grace Backenstoe, or Grace Daugherty. There is no record of said marriage in the office of the clerk of the Superior Court of Conconio county, but the absence of said record MAY BE accounted for by the failure of the justice, OR of the parties to return the license and a certificate of the solemnization of the marriage to said clerk of courts, OR the failure of the clerk to make a record thereof, upon the return of said license."**

**The majority of court** then found that both parties were well known underworld characters—the leaders in their respective spheres of gambling and owning and operating a house of prostitution and then specifically finds:

> "15. * * * **The relations between these parties prior to July, 1915, were meretricious," and that they each gave deeds and other papers in their respective names, as single and unmarried individuals from July, 1915, until August, 1919.**

After the foregoing, each separate individual judge made separate and different findings, as follows:

> "18. To sustain the foregoing findings of fact, viz., that Maurice P. Murnan and Grace Backenstoe **were husband and wife at the time of the decease** of Maurice P. Murnan.
>
> **"Geiger, P. J., finds, that a common law marriage existed between the parties after 1919,** established by their open assumption of the relations of husband and wife—followed by cohabitation as such

and were so treated and reputed in the community and circle in which they moved—which relationship continued until the time of the death of Maurice P. Murnan and that this establishes a common law marriage between the parties, but might well corroborate a ceremonial marriage."

"**That Barnes, J., finds that on or about July 15, 1915, a marriage license was duly issued to said Maurice P. Murnan and Grace Daugherty (Backenstoe) by the clerk of the Superior Court of Conconio county at Flagstaff,** and the marriage contract was entered into by said parties, and the marriage was solemnized by the justice of the peace in and for said county at Flagstaff, Arizona, that there was one witness to said marriage."

"That **Hornbeck, J., finds that an analysis of the essentials of proof will not permit of the determination that Grace Backenstoe and Pat Murnan were married in any form recognized by the law."**

The Court of Appeals also **made a finding of fact,** as to the issue of the alleged void divorce from George Backenstoe, **"that her attorney of record acted as notary in taking her affidavit for service for publication"** upon which the alleged service was made, and that the decree of divorce in that case, nevertheless, is valid and binding, and could not be collaterally attacked, since no direct attack was made and no indirect attack, except in the evidence but not by the pleadings, in this case.

Thereafter follows what purports to be the judgment, **continuing to recognize the separate, different, inconsistent findings of fact, as follows:**

"It is therefore, ordered, adjudged, and decreed upon the foregoing finding of fact by the Honorable J. D. Barnes, J. J. of this court, and of the Hon.

> Frank W. Geiger, P. J., that a marriage existed between the said Maurice P. Murnan and Grace Backenstsoe; that the majority of this court, namely Geiger, P. J., and Barnes, J., **finds that at the time of the death of Maurice P. Murnan, the said parties were husband and wife** to which finding of fact his Honor, Judge Hornbeck, dissents."

**No judge and no court made any finding that there was any claim of any contract "in presenti" of a common law marriage as required by the Ohio law.**

**Nowhere does the court find that Grace Backenstoe and M. P. Murnan were married at Flagstaff, Arizona, in July, 1915, according to the laws of Arizona.**

In the decision March 12, 1942, Barnes, Judge, stated: that **as to Grace Backenstoe the issue was the question of the possession of the real estate and the question of the rents and profits received by her** and as to all other defendants the prayer was for partition. (R., page 211.)

After judgment was entered, and during term, petitioners filed a motion (page 290, transcript), to set aside and vacate its judgments, entered June 6, 1942, and April 4, 1941, on the ground that the court was without jurisdiction on the record, under the Ohio Constitution to have heard law case i. e. ejectment, **de novo**, and to render the judgment which it did render, and that the action of the court in trying and hearing the case and in rendering the judgment it did render, on the record, was **a violation** of the guarantee set out in **the Fourteenth Amendment** to the United States Constitution and the equal protection of the law.

The Court of Appeals rendered a decision (page 294, transcript), on said motion and entered judgment overruling and denying the same (page 298, transcript).

Thereafter (page 303, transcript), petitioners filed an appeal as of right with an assignment of errors, in the Supreme Court of the state of Ohio, under Article 4, Section 2 of the Ohio Constitution and simultaneously filed a motion to certify the record of the Court of Appeals of Franklin county, Ohio, (page 300, transcript).

In the brief of the petitioners filed in the Supreme Court among the errors assigned and questions presented and decided was the specific claim that the action of the Court of Appeals was a **violation of Article 4, Section 1**, of the Constitution of the **United States** in that the Court of Appeals failed and refused to give full faith and credit to the public acts and records of the state of Arizona material and determinative of the issues in this case, **by by-passing the law of Arizona providing that no marriage shall be valid unless a marriage license shall first have been issued and a certificate executed and returned evidencing said statutory marriage.**

The court rendered a decision overruling said motion and dismissing said appeal. 140 O. S., 546. Thereafter an application for rehearing was filed which was denied.

Upon leave of court (pp. 312-314, transcript), a second application for a rehearing was filed and granted. In the second application for a rehearing the appellants specifically set up and renewed the constitutional question that the Court of Appeals was without jurisdiction to hear and try this cause in chancery on the record; that the Court of Appeals was without jurisdiction on the record to have rendered the judgment it did render; that the same was **a violation of** the guarantee set forth in the **Fourteenth Amendment** to the **United States Constitution.** Appellants also specifically set up the con-

stitutional question that the Court of Appeals refused to give full faith and credit to the public acts and records of the state of Arizona as applicable to the undisputed facts of record in this case and was **a violation of Article 4, Section 1** of the **Constitution of the United States.**

Thereafter, to wit on the seventeenth day of March, 1943 (p. 392, transcript), 141 O. S., 476, **by a divided court,** final judgment was entered against the petitioners, overruling the motion to certify the record of the Court of Appeals of Franklin county, Ohio, and dismissing the appeal filed as of right, stating that **no debatable** constitutional question was involved.

In the trial court the defendants produced one Homer Byers who was the chauffeur and who testified that he saw a **marriage CONTRACT and bond at the clerk's office at the court house, at** Flagstaff, Arizona.

In the decision of Judge Barnes in the Court of Appeals (each judge rendering a separate opinion), Barnes said:

> "It was the view of the trial court that this witness is not worthy of belief. **If, we were reviewing as on error proceedings,** we would accept this view of the trial court without question, **but since we are determining the matter de novo,** we cannot overlook the omission of this impeaching testimony." (Page 225, transcript.)

In Judge Turner's finding supra, he **found that Byers committed perjury in the trial** and was paid compensation for his time in testifying. Judge Barnes also stated at the same time as making the above statement that Byers "saw too much."

Judge Turner, was the prosecuting attorney when Byers originally admitted his perjury in 1911.

This statement by Judge Barnes, shows how all important, to the petitioners, is the effect of the **arbitrary assumption of jurisdiction** to try the case **de novo** in the Court of Appeals, and the resulting violation of the Fourteenth Amendment to the United States Constitution whereby the property of your petitioners is being taken without any due process of law and the **denial of the equal protection of the laws** and without compensation.

**In the appellate court**, the deposition of one Louis Novaro (p. 156, R.) "taken as rebuttal testimony" was introduced who testified that he was a frequenter of Grace's house of prostitution and her good friend and **that when he was told of the alleged marriage he could not believe it.** To prove this fact, he said, **Grace took a paper from a wall safe in her bedroom which to him looked like a marriage CERTIFICATE issued by the state of Arizona. No such paper was ever produced by Grace and she testified while alive that she never had any marriage papers.** Novaro also admitted that in 1912, though he knew the business of Grace Backenstoe, while he was a deputy clerk of the Court of Common Pleas of Cuyahoga county, he appeared as a character witness for her in the Cleveland divorce case, and assisted Grace in getting her alleged divorce; that when she went to Cleveland in 1912, she went to him and asked him to help get her started in a house of prostitution. No one produced, and no individual was produced, showing a single duly authenticated document concerning said alleged marriage specifically required by the statutes of

Arizona. The undisputed testimony of the clerk shows the records in Arizona are complete (pages 25 and 109, record) and there is no marriage license issued to either of these parties. In the instances of the alleged marriage **contract** and **certificate**, neither purported to be a license and no evidence was offered to authenticate or establish the verity of either.

## THE CONSTITUTIONAL QUESTIONS INVOLVED.

There are two fundamental questions arising under the Constitution of the United States on the record, presented seasonably to the Court of Appeals and to the Supreme Court of Ohio, the highest court of the state, in which a final decision could be had thereon, and such court and courts finally decided adversely to the petitioner and his co-tenant heirs.

There was no constitutional question arising in or decided by the Court of Common Pleas.

I. The first question involved Article 4, Section 1 of the United States Constitution.

II. The second question involves the Fourteenth Amendment to the United States Constitution.

### I.

The petitioners on the appeal as of right to the Supreme Court of Ohio, asserted in their briefs and errors assigned therein and applications for rehearing, that the Court of Appeals in rendering the judgment and decree which it did render on the record failed to give full faith and credit to the public acts and records of the state of Arizona. This question was also presented in oral argument before the court on the motion to certify and upon

the hearing of the motion to dismiss the appeal as of right.

The second question is subdivided into four parts, and arose as follows:

II.

(a) The law of the state of Ohio and the settled course of judicial procedings is that when one is asserting and claiming the legal title and the recovery of the possession of specific real estate, against one in adverse possession, that this is an action in ejectment at law only and **never was a chancery case** and the issues of fact therein are triable to a jury.

The **Constitution of Ohio, Article 4, Sections 2 and 6,** as amended in the year 1912, **specifically defines and limits the jurisdiction of the Supreme Court of Ohio and the Court of Appeals. The Court of Appeals is limited to try cases on appeal de novo, to chancery cases only.** Law cases must be taken on appeal on questions of law as upon petition in error. Cases wherein a constitutional question is asserted in the Court of Appeals are appealable as of right to the Supreme Court of Ohio.

The respondents on the record appealed only the judgment at law in **ejectment,** rendered by the Court of Common Pleas against them.

The only issue heard, tried and decided in the Court of Appeals was the issue **in ejectment, as to legal title and the recovery of the possession of specific real property** described in the petition.

**It was specifically asserted in the Court of Appeals, both before and after judgment, and in the Supreme Court, that since the Court of Appeals did not have jurisdiction apparent on the record to hear and determine this**

**cause, on appeal DE NOVO, as a case in chancery, that to do so was to deny the petitioners due process of law and the equal protection of the laws contrary to the Fourteenth Amendment of the United States Constitution, being arbitrary and a denial of the equal application of the law on the record.**

(b) The Court of Appeals having arbitrarily assumed jurisdiction to try the case, **de novo**, as a chancery case was without jurisdiction, on the record, to render the judgment it did render and said judgment was rendered by denying due process of law and the equal protection and application of the law and a violation of the Fourteenth Amendment of the United States Constitution in this, to wit:

1. The petitioners made a request as provided by statute for a finding of material facts to which the law gives a conclusive, determinative effect, conclusive upon the issues, and conclusions of law sufficient in law to give the Court of Appeals jurisdiction to render any judgment or enter any decree, to wit:

Was Grace Backenstoe and M. P. Murnan lawfully married as required by the laws of the state of Arizona, July 15, 1915, and did she as such surviving spouse have the sole legal title to the real property described in the petition.

2. The court refused and failed to answer material interrogatories addressed to it, so as to make a finding of fact, essential to a valid judgment.

3. The finding, judgment and decree of Barnes, judge, as to a **statutory marriage** and of Geiger, judge, as to a **common law marriage**, is without any jurisdiction to try

the case, de novo and without evidence to support a contract of marriage **on either** ground.

4. Both the Court of Appeals and the Supreme Court by a final order and judgment held adversely to your petitioners on that constitutional question. All of this, it is claimed, is an arbitrary exercise of the powers of government and a denial of the equal application of the law on the record.

(c) Petitioners raised an issue in the Court of Appeals on the record, by the evidence, attacking the validity of the alleged divorce of Grace Backenstoe from George Backenstoe in the Insolvency Court of Cleveland, Ohio. It was asserted and being apparent on the record that George Backenstoe was a non-resident of Cuyahoga county, Ohio; **that no personal service was had upon him and no affidavit for service by publication was filed therein as specifically required by the General Code of Ohio, and that said court was therefore without jurisdiction to grant any divorce therein and that the alleged decree of divorce was void.** It was further asserted that to give efficacy and binding force to this void judgment of divorce would and did result in the taking the property of the petitioners without compensation; without due process of law and was a denial of the equal protection of the laws and therefore, a violation of the Fourteenth Amendment to the United States Constitution, being arbitrary and a denial of the equal application of the law on the record.

## REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Supreme Court of Ohio has erred in deciding a federal question of substance, where the United States Supreme Court has not heretofore determined the questions and has declared principles and has applied principles not in accord with the applicable federal decisions.

Van Huffel v. Harkelrode, 284 U. S., 225-230.
John Hancock Mutual Life Ins. Co. v. Yates, 299 U. S., 178, 181-183.
Aetna Life Ins. Co. v. Duncan, 266 U. S., 389, 393, 394.
Murdock v. Memphis, 20 Wall (U. S.), 590, 635, 636.
Scott v. McNeal, 154 U. S., 34, 40.
Davis v. Weshler, 263 U. S., 23, 24.
Windsor v. McVey, 93 U. S., 274-277.
Harris v. Hordeman, 14 Howard (U. S.), 334, 341.
U. S. v. Walker, 109 U. S., 258, 267.
Williams v. F. Cowling, 63 Sup. Rep., 207.
Yick Wo v. Hopkins, 118 U. S., 356, 369, 370.

I.

2. Article 4, Section 1 of the Constitution of the United States provides that every state shall give full faith and credit to the public acts and records of every other state.

The Supreme Court of the United States and the federal courts have declared that when a statute of a state prescribed, defines or limits the things which are essential and effective to create a binding contract, that it is essential that in any court in any state wherein remedy is sought under such contract that the essential requisites of the statute must be found in order to constitute a binding contract and that they be sustained by evidence

**rather than mere surmise, conjecture, suspicion or experiments of the trial judge.** This court has also asserted that where the findings of facts and conclusions of law are so intermingled with a claim of federal right as to make it necessary in order to pass upon and determine the federal question asserted, that the Supreme Court of the United States will analyze the facts in order to determine whether a federal right asserted in the state courts has been denied as a result of a finding shown by the record to be without any evidence sufficient in law to support it.

The Constitution of the United States, Article 6, says that the Constitution shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or the laws of any state to the contrary notwithstanding.

To permit the courts of the state of Ohio, to ignore the statutes of the state of Arizona and the public records therein by holding **that the absence of the essentials of a marriage record required by statute MAY BE accounted for** by the failure of the public officials of that state to perform their solemn duty, or the failure of the parties to do something **without any evidence of any kind whatsoever,** to sustain such a finding, **and when the undisputed evidence shows that the records as required by the statutes are complete, is to permit one state to bypass the laws of another state by surmise, conjecture, suspicion and guess on the part of the court and a violation of the constitutional guarantee of full faith and credit to be given to such public acts and records.** Assuming the unsoundness of the action of the Supreme Court of Ohio, in this matter, and of the Court of Appeals,

it is probable that such action will be cited as a precedent in other states as a reason for ignoring this provision of the federal Constitution.

3. (a) By a long line of decisions, applicable to the pleadings and the record in this cause, it is and has been the settled law in Ohio and a part of due process under the law of Ohio, that when one party asserts the legal title to premises as against another who also claims the sole legal title and seizin and is in possession thereof, that the action, is an action in ejectment, at law, and triable only at law and that the issues of fact therein, by specific provision of statute, are triable to a jury.

(b) It is the settled law in Ohio that such an action is not an action in chancery and never has been.

The Constitution of the state of Ohio, Article 4, Section 6, provides that **chancery cases only are appealable and triable de novo.**

It is the settled law in Ohio that if the case in the Court of Common Pleas as tried and decided between the parties on the issue raised in the pleadings was primarily an action **in ejectment at law** and not a case in chancery that then the Court of Appeals under the Constitution of Ohio, is without jurisdiction to hear and try the case de novo, as a chancery case, and that when the question of the jurisdiction of the Court of Appeals to try such a case is raised before trial, before judgment, after judgment, all in term, and subsequently on appeal as of right is filed in the Supreme Court of Ohio, such appeal raises a question under the Constitution of the state of Ohio and must be heard upon its merits.

To dismiss such an appeal filed as of right without a hearing upon the merits is a denial of due process of law

and the equal portection of law, is arbitrary and a denial of the equal application of the law on the record and in violation of the Fourteenth Amendment to the United States Constitution.

(c) It is the established law of Ohio since its incorporation as a state that the jurisdiction and power of a court to render judgment or decree, and what judgment or decree it is required to enter upon its journal is determined solely by what facts are alleged and what issue is made by the pleadings. Under the pleadings and issues tendered in this cause between the petitioners and Grace Backenstoe and her heirs, the only issue tendered as conceded by respondents (page 39, brief) was the recovery of the possession of specific real property and the determination of the legal title thereto. **The only judgment which the Court of Appeals had power or jurisdiction to enter as between these parties was a judgment at law in ejectment affirming or reversing the judgment of the Common Pleas Court on that issue, as if the case had been appealed upon questions of law.**

The action of the Court of Appeals and of the Supreme Court of Ohio in denying the claims and rights of your petitioners, on the record, and in taking their property without jurisdiction on the record is so arbitrary and without support in and contrary to law or fact, on the record, as to be a denial of due process of law and the equal application of the law.

To deny this petition for the writ of certiorari would give added force to the action of the Ohio Supreme Court, assuming its unsoundness, because of the fact of the denial of certiorari would be referred to in future controversies or in other states being confronted by a

similar situation or state of the record and this fact makes it important that there be a final determination of the principles involved on the record under the Constitution by the United States Supreme Court.

(d) Under the Constitution of the state of Ohio, as amended in the year 1912, it is the settled law of the state of Ohio, that a judgment or decree of a court rendered without jurisdiction of the parties or the subject-matter is void and can be attacked at any time or in any court by anyone whose rights are affected thereby. The action of the Court of Appeals in this cause holding that the petitioners cannot collaterally attack the void judgment of the Insolvency Court of Cuyahoga county, Ohio, thereby enabling respondents to claim the property of M. P. Murnan as the heirs of his alleged surviving spouse, when as a matter of fact in law, **Grace Backenstoe was never in a position to marry M. P. Murnan**, is arbitrary, a denial of due process of law and a taking of property without due process of law, without compensation and a denial of the equal protection and application of the law and in violation of the Fourteenth Amendment of the Constitution of the United States.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directing to the Supreme Court of the state of Ohio, commanding that court to certify, and to send to this court for review and determination, on a day certain to be therein named a full and complete transcript of the record and proceedings so far as it is material and pertinent to the questions and issues herein presented in the case numbered and entitled on its docket No. 29315, Ralph Rea, plaintiff-appellant, v. Margaret

Fornan, now known as Margaret N. Catcher, Marty Martin, Mary Fallon, Joseph Fallon, John Fallon, Margaret W. Smith, John Murnan, known as David Murnan, Julia Hurst, Margaret Murnan, Julia Meager, Herman Murnan, Paul Murnan, Jerry Murnan, John Murnan, Mary Murnan, James Murnan, Thomas Murnan, Dorothy Firoben, Ragina McDonough and Katherine McDonough, defendants, Mary Boland, Katherin Gruber, Anna Ford, Julia Galey, James Welsh, William Welsh, Mathew Welsh, Nora M. Page, Timothy Murnan, Mary Meyer, Grace Visser, Howard W. Meyer, John J. Meyer, Maria Miller, Nellie Pagnard, Virginia Rea and Ruth Hirt, defendants and appellants, William B. Devanney, Lulu Devanney, Daisy Devanney Pike, William B. Devanney, as executor under the last will and testament of James Devanney, Anna McDonough Aplin, Lawrence McDonough, James McDonough, Fred McDonough, Frank McDonough, Joseph McDonough, Charles McDonough, Edward McDonough and Raymond W. Kilbourne, executor of the estate of Grace Backenstoe Murnan, deceased, Margaret Fallon Lunn and Grace D. Backenstoe, deceased, defendants and appellees, and that said judgment of said Supreme Court of Ohio, may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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